

Chapter 12-3 Drug Testing

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Boulder Revised Code, 1981

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Adopted by Ordinance No. 5195.

12-3-1 Definitions.

The following terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

“Commercial vehicle” means any vehicle which meets the definition set forth in the Colorado Department of Public Safety Minimum Standards for the Operation of Commercial Vehicles.

“Employee” means a person treated as an employee for purposes of federal income tax withholding (a) who is assigned or anticipated to be assigned to an immediate supervisor located in the city and does not have a principal out of home office located outside of the city or (b) who is assigned or anticipated to be assigned more than thirty-three percent of the time on the job for a period of more than three months to a job located in the city.

“Employer” means a person who pays wages or salary to an employee, an agent of such a person, or a person in a position of authority over an employee.

Ordinance No. 5688 (1994).

12-3-2 Post-Employment Drug Testing Requirements.

Except as provided in Section 12-3-4 below, no employer shall request or require from an employee any urine, blood, or other bodily fluid or tissue test for any drug or alcohol or determine an employee's eligibility for promotion, additional compensation, transfer, disciplinary, or other personnel action, or the receipt of any benefit, based in whole or in part on the result of such test, unless all of the following conditions are met:

(a) At the time of the request or requirement, the employer has individualized reasonable suspicion, based on specific, objective, clearly expressed facts, to believe that the employee is under the influence of a drug or alcohol on the job, or his or her job performance is currently adversely affected by use of a drug or alcohol, or the employee has agreed to the test as a part of an employee assistance program after a finding or admission of prior drug or alcohol abuse;

(b) Prior to the administration of any drug or alcohol test, the employer adopts a written testing policy and makes it available to all employees. But a copy need not be provided directly to each employee, so long as a copy is made available freely for inspection by employees at any reasonable time during working hours, without personal identification of the employees. Such testing policy must, as a minimum, set forth all of the following information:

(1) The employees subject to testing under the policy;

(2) The circumstances under which drug or alcohol testing may be requested or required;

(3) The right of an employee to refuse to undergo drug or alcohol testing and the consequence of refusal;

(4) Any disciplinary or other personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;

(5) The right of an employee to obtain, immediately upon request to the employer's custodian thereof, a copy of all records maintained of his or her initial positive confirmatory test results, and to submit written information explaining any such results;

(6) Any other appeal procedure available; and

(7) A copy of this chapter.

(c) The collection of any urine specimen is accomplished without direct observation of the genitals by any person other than the employee being tested;

(d) A sufficient specimen is collected to perform two tests, and the one untested specimen is maintained until a negative test result is obtained, or, in case of a positive result, for a period of not less than one year following the date on which the specimen is collected;

- (e) No portion of any specimen is tested for pregnancy, and except for pre-employment physicals, no portion of any specimen is examined for evidence of any other medical condition, other than for the presence of alcohol or drugs;
- (f) The collection, storage, and transportation of the specimen is accomplished in tamper-proof containers;
- (g) Chain-of-custody documentation identifies how the specimen was handled, stored, and tested, at all times;
- (h) Positive test results are confirmed by means of gas chromatography/mass spectrometry or an alternate method of equal or greater sensitivity and accuracy;
- (i) The employer permits the employee, at the employee's request and expense, to contract with a laboratory meeting the National Institute of Drug Abuse Standards to have a second confirmatory test performed on an untested portion of the original specimen, subject to the same chain-of-custody assurances provided for the original test; and
- (j) The release of the test results is prohibited, except as authorized by the person tested, or to those employees of the employer with reasonable business need to know, or as required by a court of law.

Ordinance No. 5688 (1994).

12-3-3 Job Applicant Drug Testing Requirements.

Except as provided in Section 12-3-4 below, no employer shall conduct a drug or alcohol test as part of a pre-employment screening or pre-employment physical except under the following circumstances:

- (a) The employer includes notice that a drug or alcohol test will be part of the pre-employment screening process or pre-employment physical in the application for employment, or if no application form is required, in all advertisements soliciting applicants for employment, and all applicants for employment are personally informed of the requirement for a drug or alcohol test at the first formal interview;
- (b) The drug or alcohol test is required only of Colorado residents who are the single finalist for the position or out-of-state resident finalists for the position who come to Colorado for an interview, if the same test is required of all finalists for that position; and
- (c) Subsections 12-3-2(b) through (j), B.R.C. 1981, are complied with concerning job applicants as well as employees.

Ordinance Nos. 5271 (1990); 5688 (1994).

12-3-4 Exemptions.

(a) The following are exempt from this chapter:

- (1) United States government;
- (2) Colorado state government;
- (3) The University of Colorado;
- (4) Boulder County government;
- (5) Boulder Valley School District; and
- (6) Testing of an employee operating a commercial vehicle weighing over 26,000 pounds and for which a Commercial Driver's License is required, or which transports sixteen or more passengers, including the driver, under the Controlled Substances Testing Provisions set forth in the U.S. Department of Transportation regulations for commercial vehicles.

Ordinance No. 5688 (1994).

12-3-5 Employers' Rights.

(a) Nothing in this chapter restricts an employer's ability to prohibit the use of, possession of, or trafficking in, illegal drugs during work hours, or restricts an employer's ability to discipline an employee for being under the influence of, using, possessing, or trafficking in, illegal drugs during work hours or on the employer's premises. Nothing in this chapter restricts an employer's ability to prohibit the use of alcohol during work hours, or restricts an employer's ability to discipline an employee for being under the influence of alcohol during work hours or on

the employer's premises.

(b) Nothing in this chapter prevents an employer from conducting routine medical examinations of employees or medical screening in order to monitor exposure to toxic or other unhealthy substances encountered in the work place or in the performance of an employee's job responsibilities. But no employer shall extend medical screening beyond the specific substance being monitored, and any inadvertently obtained information concerning drug or alcohol use shall be maintained in confidence in the medical record and not disclosed to any employer. No employer shall use any such evidence to determine promotion, additional compensation, transfer, termination, disciplinary or other personnel action or the receipt of any benefit.

(c) It is an affirmative defense that a person was required to conduct drug or alcohol testing or take disciplinary action against an employee based on such testing in order to comply with a statute or regulation of the United States or the State of Colorado or any of their agencies or any agency interpretation of such statute or regulation. It is a specific defense that a person, based on specific, objective, clearly expressed facts, was reasonably required to conduct such testing or take such action in order to compete effectively to obtain a contract with the United States or the State of Colorado or any of their agencies.

Ordinance No. 5688 (1994).

12-3-6 Enforcement.

(a) The penalty for violation of any provision of this chapter is a fine of not more than \$1,000.00 per violation. In addition, upon conviction of any person for violation of this chapter, the court may issue a cease and desist order and any other orders reasonably calculated to remedy the violation. Violation of any order of the court under this section is a violation of this section and is punishable by a fine of not more than \$2,000.00 per violation, or incarceration for not more than ninety days in jail, or both such fine and incarceration.

(b) Any person who commits or proposes to commit an act in violation of this chapter also may be enjoined therefrom by the municipal court or by any other court of competent jurisdiction.

(c) An action for injunctive relief under this chapter may be brought by the city attorney, upon ascertaining that a violation is likely to occur. Nothing in this chapter shall be construed to create a private right of action for damages.

Ordinance Nos. 5195 (1989); 5639 (1994); 5688 (1994).

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